IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

DAVID J. FOGELSON and CORINNE FOGELSON, husband and wife,

Plaintiffs-Appellees,

v. **Ct. App. No. 35,086**

ERIC WALLACE, MARK BOZZONE, WALLEN DEVELOPMENT, INC., DEVELOPMENTS BY WALLEN, LLP,

Defendants-Appellants.

COPY

COURT OF APPEALS OF NEW MEXICO
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DEFENDANT-APPELLANT MARK BOZZONE'S REPLY BRIEF

On appeal from the Thirteenth Judicial District Court
The Honorable George P. Eichwald

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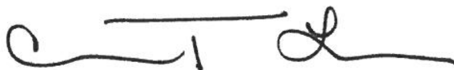
STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(C) NMRA, Defendant-Appellant, Mark Bozzone, states that this Reply Brief complies with the length limitations of Rule 12-213(F)(3) NMRA. The brief uses a proportionately spaced font, has a typeface of 14 points, and contains 4,226 words. The word count is obtained using Microsoft Word 2010.



Alice T. Lorenz

STATEMENT OF ABREVIATIONS

Trial transcripts are identified as follows:

April 29, 2014: Tr.I
April 30, 2014: Tr. II
May 1, 2014: Tr.III

Plaintiffs exhibits are identified by Exhibit number.

Eric Wallace's exhibits are identified by name and letter, e.g. "Wallace Exhibit A."

Mark Bozzone's exhibits are identified by name and letter, e.g. "Bozzone Exhibit A."

I. SUMMARY OF ARGUMENT

On appeal, as at trial, Plaintiffs rely on evidence that, at best, might support a claim of negligent interference with contract—a claim that is nonactionable in New Mexico. See *National Roofing, Inc. v. Alstate Steel, Inc.*, 2016-NMCA-020, ¶¶ 4, 7, 366 P.3d 276. In *National Roofing* this Court cited the Restatement (Third) of Torts: *Liability for Economic Harm* § 1(a) (Tentative Draft No. 1, 2012) for the proposition that an "actor has no general duty to avoid the unintentional infliction of economic loss on another." And it recognized that, as stated in the Restatement (Second) of Torts, § 766C (1979), a plaintiff cannot sue another in negligence for conduct that caused a third party to breach a contract with plaintiff. *Id.*

Plaintiffs argue as if evidence that Mark Bozzone *should have known* the specifics of their contract and circumstances, could suffice, and so fail to recognize that the district court's reliance on unpled and nonactionable assertions of negligence is error. A duty, running from Mark to Plaintiffs, and intentional acts, based on actual knowledge, were required for all of Plaintiffs' causes of action. They were proved for none.

Plaintiffs' argument on preclusion of this second suit ignores the purposes of preservation of error rules, and the fact that the district court ruled on the issue. In arguing that Mark cannot rely on the legal consequences that flow from his status as a Wallen agent, Plaintiffs ignore their own role in establishing that Mark acted

as an agent for Wallen Development, Inc. and Developments by Wallen, LLP (sometimes jointly referred to as "Wallen"). Plaintiffs don't address the legal consequences of the agency they established: Mark's only duties could have been to Wallen, its Owners, including Wall2Builders LP, Wall2Development, Inc., and their general partner, Wall2Holdings, LLC (Holdings). They also ignore the fact that the overall theme of Mark's defense was that he had a right to take the actions he did in order to solve Wallen's issues and keep Wallen going as a viable entity. Thus, Plaintiffs' arguments miss the mark.

Plaintiffs do not dispute the conditions Wallen faced when property values plummeted and banks made everything worse for businesses being damaged by the crisis the financial industry had created. Plaintiffs never claimed that actions taken to reduce Wallen's debt load, its expenses, or to reduce inventory of undeveloped land, exceeded the bounds of business judgment. There is no meaningful distinction between these actions and Wallen's delaying payment on invoices until it had funds with which to pay, its efforts to obtain new and renewed lines of credit, or decision to close when all hope was lost. Thus, there is no basis for characterizing these latter efforts as "wrongful."

Plaintiffs treat as wrongful all decisions they claim affected them, as if their impact on Plaintiffs rendered them tortious. But there is no legal basis for treating these decisions differently from other business judgment decisions that agents of

an entity in financial difficulties may take in an effort to save that entity. *In re Midway Games, Inc.*, 428 B.R. 303, 315 (Bkrcty. D. Del. 2010) (directors do not have a duty to creditors to abandon the effort to rehabilitate the corporation in favor of the creditor's interests; they have no duty to protect creditors at the expense of the entity and its shareholders).

Plaintiffs fail to address the other missing elements of their claims, including actual knowledge, required for all claims, the bar to the conspiracy claim posed by the intercorporate conspiracy doctrine, or *prima facie* tort's requirement of malicious intent to harm.

II. POINTS AND AUTHORITIES

A. Defendants preserved the issue whether the first district court suit precluded the second

Before Mark was added as a party, Wallace twice raised the preclusive effect of Plaintiffs' first suit [RP 51-55, 199-207]. Mark moved for partial summary judgment on May 15, 2013, explaining that Plaintiffs, having obtained a judgment against Wallen, could not veil the same facts in a tort cause of action [RP 593]. And in Mark's opening statement, he maintained without objection from Plaintiffs, that the first case barred this one [Tr.I:16-17].

There were multiple bases supporting preclusion. Which preclusion argument was most correct is of little importance as it is the underlying policies of avoiding piecemeal litigation, and of finality, which matter. *Local 2839 of*

American Federation of State, County and Mun. Employees, AFL-CIO v. Udall, 1991-NMSC-017, ¶¶ 30, 33, 806 P.2d 572 (court cares less "for the name by which one calls claim or issue preclusion than it has for the policy which is to be served in applying principles of finality").

The district court was aware of the preclusion issues, ruled on them, and this Court has the record required for an informed decision. Thus, the purposes of the preservation rules have been fulfilled. *State v. Allen*, 2014-NMCA-047, ¶ 9, 323 P.3d 925 (primary purposes of preservation rule are to alert district court to the claim of error, allow opposing party a fair opportunity to respond and create a record sufficient to allow Court of Appeals to make an informed decision); *Baca v. Marquez*, 1987-NMCA-011, ¶ 5, 737 P.2d 543 (purpose of preservation rule is fulfilled where the trial court was aware of the issue and specifically addressed it). Plaintiffs' attempt to evade the preclusion issues should be rejected.

B. The rules of civil procedure provided for joinder of the individuals in the original action

Plaintiffs' claim that they could bring piecemeal lawsuits—once they realized they could not collect their entire judgment from Wallen—is based entirely on the assumption that, because they had to arbitrate with Wallen, they did not have to join, in their district court action, persons in privity with Wallen. No authority supports this attempt to take two bites at the apple. Instead the Rules of

Civil Procedure provide a simple way for Plaintiffs to have joined all claims in one action.

Rule 1-020 NMRA permits all persons to be joined in one action as defendants:

> if there is asserted against them jointly, severally or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.

Thus, when Plaintiffs filed their first complaint, they could have named all persons they believed were responsible for Wallen's breach of contract and asserted whatever causes of action they thought they had against those individuals. They could then have stayed those claims while they arbitrated against Wallen.

Rule 1-020 operates in conjunction with Rule 1-018(A) NMRA (plaintiff may join in a complaint as many independent or alternate claims, legal or equitable, as he may have), and Rule 1-019 NMRA (requiring joinder of parties with an interest relating to the subject of the action where that interest could be impaired or impeded by the action). They provide a simple road map to the process Plaintiffs should have followed.

By not following these rules, Plaintiffs did an end run around the important policies of judicial efficiency and finality. *Aguilera v. Palm Harbor Homes, Inc.*, 2004-NMCA-120, ¶ 16, 99 P.3d 672 (ordinarily, principles of finality and judicial economy weigh against consideration of claims that could have been, but were not,

litigated in a prior proceeding); *Bank of Santa Fe v. Marcy Plaza Associates*, 2002-NMCA-014, ¶ 14, 40 P.3d 442 (barring claims that could have been raised in prior proceeding "ensures finality, advances judicial economy, and avoids piecemeal litigation"). Their second action, therefore, should have been barred.

C. Plaintiffs established Mark's status as an agent; their failure to recognize the legal consequences of their own proof does not amount to a failure of proof on his part

Plaintiffs' primary response to legal authorities that demonstrate that, as a matter of law, Mark owed them no duty, was privileged to interfere with their contract, and lacked capacity to be a co-conspirator, is that Mark had maintained as part of his defenses below that he was **not** an officer or director of Wallen. This response fails on many fronts.

Plaintiffs have lost sight of the fact that, by establishing that Mark was "active at a high level of management" in Wallen, they established Mark's legal status as an agent and de facto officer of Wallen [See RP 1152-53, 1158-59, 1162-63, 1172, findings 17, 18, 21, 50, 70, 76, 78, 103, 108, conclusion 25]. Therefore, the law governing duties of agents, which extends to de facto agents, necessarily applies to Mark. *Walta v. Gallegos Law Firm, P.C.*, 2002-NMCA-015, ¶ 41, 40 P.3d 449; *Restatement (Third) Agency*, § 8.01 (2006, database updated June 2016); *In re Hearthside Baking Co., Inc.*, 402 B.R. 233, 247, 249 (Bkrtcy. N.D. Ill. 2009) (one who assumes role of fiduciary owes fiduciary duties to their principal,

including duty of undivided loyalty); *Fletcher, Cyc. Corp.* § 1158.10 (Current through 2015 Update) (privilege to influence the actions of a corporation by inducing it to breach its contracts "extends to non-employees who serve as business advisors and agents"). Because the district court rejected it, Mark's argument that he was not a Wallen director or officer[1] is irrelevant to the legal question whether Plaintiffs' attempted causes of action against him were viable.

It was Plaintiffs' burden to prove that Mark owed them a duty. *Calkins v. Cox Estates*, 1990-NMSC-044, ¶ 7, 792 P.2d 36 ("plaintiff must show that defendant's actions constituted *a wrong against him*, not merely that defendant acted beneath a required standard of care...."). Mark argued that he had no such duty and justified his actions because they were for the benefit of Wallen [See e.g. RP 1038-41]. Plaintiffs attempted to establish a duty by proving that Mark, as a high-level member of management, was making decisions for Wallen. Plaintiffs' error in concluding that Mark's actions as part of Wallen's management team meant he had a duty to them does not bar Mark from addressing the dispositive legal question of duty.

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[1] Mark limited his argument to "officer" or "director" of Wallen. While he viewed his primary role as being that of agent for an indirect owner, Mooresville, he did not deny acting as an agent of or for Wallen or Holdings [See e.g. RP 595, 1041].

Mark had no obligation to introduce testimony regarding his status as a manager of Holdings, the general partner of Wall2Builders LP. Mark's role in Holdings was never disputed, the documents establishing him as a Holdings manager were introduced into evidence without objection, [*see e.g.* Exhibit N], and the duties that arise from that status arise as a matter of law. *Robertson v. Carmel Builders Real Estate*, 2004-NMCA-056, ¶ 18, 92 P.3d 653 ("An agent is a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair or does some service for the principal, with or without compensation.").

Mark's role in Holdings, as Mooresville's manager, and his status as an agent and de facto officer of Wallen, all gave rise to the same set of fiduciary duties [Tr.II:78; Bozzone Exhibit C, Wallace Exhibit N]. *Robertson,* 2004-NMCA-056, ¶ 18; *Restatement (Third) Agency*, § 8.01 (2006, database updated June 2016). These duties ran to Wallen and its owners, whose interests were entirely congruent—getting Wallen through its cash crunch and regaining its status as a profitable entity. *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007) (when corporation is experiencing financial difficulties or is "navigating in the zone of insolvency, the focus for…directors does not change." Agents must continue to exercise their business judgment in the best interests of *the entity and its owners*) (emphasis added).

Regardless of the source of Mark's fiduciary duties, those duties precluded the imposition of any duty to Plaintiffs. *Las Luminarias of the New Mexico Council of the Blind v. Isengard*, 1978-NMCA-117, ¶ 8, 587 P.2d 444 (corporate officer has duty of undivided loyalty); *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006) (agent breaches duty of loyalty unless acting with sole purpose of advancing best interests of the entity); *Torch Liquidating Trust v. Stockstill*, 561 F.3d 377, 382-85 (5th Cir. 2009) (corporate fiduciary never owes duties to corporate creditor); *Gheewalla*, 930 A.2d at 101. No testimony could have added anything relevant to the legal question whether Mark's duties to Wallen and its owners precluded duties to Plaintiffs.

But perhaps most importantly, Plaintiffs' claim makes no sense given that they were the ones trying, successfully as it turned out, to establish Mark's status as an agent. They can hardly claim to now be surprised by his status as an agent. Plaintiffs' apparent misunderstanding of the legal consequence of that status provides no basis to ignore governing agency, civil conspiracy or contract law, or to enter or affirm a judgment against an individual who, as a matter of law, had no duty to them.

Plaintiffs' contention that it was Mark's burden to establish that he was acting for his principals is wrong. It was Plaintiffs' burden to show, *inter alia*, that Mark acted without justification or privilege. *Deflon v. Sawyers*, 2006-NMSC-025,

¶¶ 16, 137 P.3d 577 (identifying the absence of justification or privilege as an element plaintiff must prove). They failed to meet that burden.

As the ones asserting "conspiracy," it was also Plaintiffs' burden to establish Mark's capacity to be a co-conspirator. *Valles v. Silverman*, 2004-NMCA-019, ¶ 27, 84 P.3d 1056 (person can only be held liable as co-conspirator if he is "legally capable" of committing the underlying tort). "Legal capability" is a legal question, which in the instant case is answered in the negative by Mark's status as a Wallen agent. *Kokoricha v. Estate of Keiner*, 2010-NMCA-053, ¶ 11, 236 P.3d 41.

Mark raised the lack of duty to Plaintiffs, established his status with Holdings and Mooresville, established that his efforts were to benefit Wallen and its owners (including Mooresville), and raised Plaintiffs' failure to prove essential elements of their claims [RP 1037-49]. Plaintiffs in turn proved that Mark was a Wallen agent and thereby proved themselves out of court.

D. Even assuming arguendo Mark's status as an agent for Wallen entities did not preclude Plaintiffs' claims, those claims failed due to lack of proof on their requisite elements

1. Plaintiffs failed to establish requisite elements of their intentional interference claim

a. Actual knowledge went unproved

Plaintiffs admit that to prove intentional interference they had to show that Mark had "knowledge of the contract" [p.31]. But they presented no evidence of actual knowledge. It was established that Mark had not read Plaintiffs' Purchase

Agreement or its Cash Addendum (or any Wallen purchase agreement, for that matter). Thus, there was no evidence that Mark had actual knowledge of Plaintiffs' contract's specifics. There was also no evidence that Mark was specifically aware of Plaintiffs as purchasers or as creditors of Wallen.

Because actual knowledge, not just means of knowledge, was required, Plaintiffs' claims failed as a matter of law. *Lihosit v. I &W, Inc.*, 1996-NMCA-033, ¶ 20, 913 P.2d 262 (it is not sufficient that party has means of information in situations where, to be held responsible, an act must be done with actual knowledge).

b. Bad faith, innately wrongful, predatory, or action against the interest of Wallen was not proved

Plaintiffs acknowledge that, for liability, Mark's actions needed to have been outside the scope of his agency, in bad faith, innately wrongful or predatory, and against Wallen's interest. Yet they rely on actions he took to keep Wallen in business while it tried to work its way out of a cash crunch and loss of value of its largest assets—exactly what is expected of a loyal agent, director, officer or employee. *In re Midway Games, Inc.*, 428 B.R. at 315.

Plaintiffs complain of actions that had nothing to do with them, and everything to do with trying to save Wallen. But intent to take an action that later, and indirectly, causes injury, without specific intent to cause that injury, does not suffice, even if the action can be characterized as "negligent." *National Roofing,*

Inc., 2016-NMCA-020, ¶¶ 4, 7. There can be no intent to injure a person whose existence is unknown.

c. Additional "facts" Plaintiffs are claiming were established either went unproved or do not meet their burden of proof

Plaintiffs argue that Mark acted "individually." The issue addressed below arose from Mark's position that Mooresville, not Mark, was the investor in Wallen [RP1163, 1173, finding 108, conclusion 37;Tr. II:178-79,181-82,194-95]. Given the absence of evidence that Mark invested individually in any Wallen entity—funds having come from Mooresville or other corporate entities in which he held an interest—the "finding" that Mark acted "individually" lacks evidentiary support [Tr.II:178-79,194-95; Bozzone Exhibit C]. This erroneous *conclusion* is at odds with Mark's role as Mooresville's manager, Mooresville's ownership interest in Wallen, and the law of agency.

Plaintiffs cannot now argue that the conclusion that Mark acted "individually" equates to a determination that he was not acting on behalf of Wallen and its owners, as that irreconcilably conflicts with the findings and conclusions on which the judgment rests [See e.g. RP 1152-534, 1158-59, 1162-63, 1172, findings 17, 18, 21, 50, 70, 76, 78, 103, 108, conclusion 25]. Mark, individually, was a Holdings manager [Exhibit N]. As such he had the right to make decisions for the Wallen entities. It is only in that context, and to that extent, that he could be said to have acted "individually."

But if Plaintiffs are arguing that Mark was merely an individual, acting to protect personal interests, they are making an argument that does not help them. As an individual Mark had an unfettered right to protect his own interests, and had no duty to Plaintiffs. *Fikes v Furst*, 2003-NMSC-033, ¶ 23, 81 P.3d 545; *Speer v. Cimosz*, 1982-NMCA-029, ¶ 15, 642 P.2d 205.

Plaintiffs raise, as if it had a bearing on issues raised by Mark's appeal, the fact that Mark told Montoya to advise creditors that Wallen was in the middle of renewal with banks to raise additional capital. [RP 1159, finding 74]. But there is no evidence that this information was conveyed to Plaintiffs, making it irrelevant to Plaintiffs' claims.[2]

Plaintiffs have misunderstood Mark's challenge to "Finding" 54—which is an unsupported conclusion of law. Mark never claimed to have been uninvolved in or unaware of the decision to push payables when Wallen had insufficient funds. What is challenged is the legally unsupportable notion that he had any duty to protect any "rights" of Plaintiffs [RP 1157, finding 54]. Mark's duties of loyalty, due care and confidentiality ran solely to Wallen and its owners. *Gheewalla*, 930 A.2d at 101. Thus the assumption of a duty is legally erroneous.

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[2] Plaintiffs' claim that Mark knew that funds earmarked for a specific purpose were not exclusively used for that purpose is addressed in the Answer Brief on Cross Appeal at 4, 6-9, 25-26, because that claim is not relevant to the intentional interference with contract claim, and so is also irrelevant to the claim of a conspiracy to breach Plaintiffs' contract.

Plaintiffs had no evidence that, as of February 24, 2009, Wallen could pay for completion of partially built homes. Thus, they have no basis for assuming that the decision to stop working on February 24, 2009, after Wallen's account had been swept clean of funds, was wrongful. To the contrary, it would have been wrong to have kept Wallen employees and contractors working, knowing they could not pay them.

Plaintiffs' complaint about Wallen's actions in or after May 2009, after Wallen sold land, is untethered to any action in which Mark was involved. The undisputed evidence below, and apparent admission on appeal,[3] is that, as of March 2009, Mark had no further role with Wallen [Tr.II:99]. Thus, even if Wallace and Filener should have used all of Plaintiffs' funds on their house, there is no claim against Mark [see facts discussed in Mark's Brief-in-Chief, 16-20].

2. Plaintiffs did not prove an agreement to commit a specific wrong by persons who were legally capable of conspiring

Plaintiffs claimed a conspiracy to breach a contract. But they proved no such conspiracy. Instead they relied on actions that were allegedly *negligent* as to them,

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[3] Plaintiffs acknowledge that decisions made by *Wallace and Filener* were the "major reason" Plaintiffs were not repaid. Answer Brief, 13. They do not rebut Mark's proof of his lack of involvement in post-closing decisions. See Bozzone Brief-in-Chief, 36-37. This squares with Plaintiffs' response to Mark's district court motion on intentional interference, wherein they asserted that Filener and Wallace were responsible for misuse of funds derived from land sales [RP 718].

and produced no proof of actual knowledge of their contract, an essential element of their claim. 16 Am. Jur. 2d *Conspiracy* § 51 (Database updated Aug. 2016) ("One cannot agree, expressly or tacitly, to commit a wrong about which he or she has no knowledge.")

Plaintiffs established no point in time when a conspiracy to breach their specific contract came into being. And they could not establish that Mark or Wallace were legally capable of being conspirators. See *Fasoli v. City of Stamford*, 2014 WL 6808679, * 20 (D. Conn. 2014) (corporate officers, agents and employees are legally incapable of a conspiracy); *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1261 (11th Cir. 2010) (acts of corporate agents are attributable to the corporation, which negates the multiplicity of actors necessary for formation of a conspiracy); *McMillan v. Oconee Memorial Hosp., Inc.*, 626 S.E.2d 884, 886-87 (S.C. 2006) ("civil conspiracy cannot exist when the alleged acts arise in the context of a principal-agent relationship because, by virtue of that relationship, such acts do not involve separate entities").

None of the conduct complained of—delaying payments to vendors when there were insufficient funds to timely pay, failing to prevent the filing of liens when Wallen could not pay subcontractors, failing to finish the house after Wallen's funds were swept by a bank, leaving it without funds with which to pay staff—can logically be viewed as intentionally directed at breaching Plaintiffs'

contract. In fact, Plaintiffs' proof was not of actions directed at them or their contract. They relied on failures by Wallen agents to act in Plaintiffs' interests when making corporate decisions. Given that the agents' duties were to act solely for their principals, this "failure" cannot support a conspiracy claim.

Finally, evidence that Plaintiffs' claim shows that Mark "could have known" and perhaps "should have known" their circumstances does not meet Plaintiffs' burden. *Deflon*, 2006-NMSC-025, ¶ 16; 16 Am. Jur. 2d *Conspiracy* § 51, *supra*, (for civil conspiracy parties must be aware of the harm or wrongful conduct at the beginning of the combination or agreement).

3. The *prima facie* tort claim should have been dismissed before trial

While Plaintiffs admit a *prima facie* tort claim should be dismissed if the intentional interference with contract claim is viable, that is not the remedy required under New Mexico law. *Bogle v. Summit Investment Co., LLC,* 2005-NMCA-024, ¶¶ 22-23, 107 P.3d 520, establishes that where intentional interference with contract is the appropriate claim, a plaintiff cannot resort to *prima facie* tort. This is true even where the intentional interference claim fails, because resorting to *prima facie* tort would be a classic case of trying to avoid the "stringent requirements of other established doctrines of law." *Bogle*, 2005-NMCA-024, ¶ 22.

Plaintiffs based their *prima facie* tort claim on the same facts as their other claims. By reaffirming their reliance on those facts in their Answer Brief, they have established that their *prima facie* tort claim should have been dismissed pretrial.

Even assuming *arguendo* that proceeding to trial on *prima facie* tort was not erroneous, that claim required an intentional lawful act, a specific intent to injure Plaintiffs, and insufficient justification for the act. *Id.* As the Brief-in-Chief and foregoing discussion demonstrate, none of these elements were, or could have been, proved.

4. There is no basis for punitive damages

There was no evidence that Mark acted *towards* plaintiffs, let alone acted with malice, utter indifference, or recklessly towards Plaintiffs. He did not know them, or of them, and he had no duty to them. He did have fiduciary duties to Wallen and its owners. Those duties precluded duties to Plaintiffs. Thus, neither a failure to disclose nor to protect Plaintiffs could support punitive damages.

III. CONCLUSION AND REQUEST FOR RELIEF

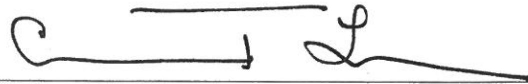
The Judgment violates principles of agency law, is contrary to the law governing intentional interference with contract, the law governing civil conspiracy claims, and the law governing claims of *prima facie* tort. Plaintiffs should not have prevailed based on unpled claims of negligent interference, which

are nonactionable. *National Roofing, Inc.*, 2016-NMCA-020, ¶¶ 4, 7. And yet that is all that their proof below and their Answer Brief have to offer.

The only viable claim Plaintiffs had was breach of contract against Wallen. Their inability to collect the full amount of their breach of contract judgment did not permit filing of piecemeal actions, or saddling Wallen's agents with liability for Wallen's breach. This lawsuit should never have been permitted to survive motions to dismiss and for summary judgment.

For all these reasons, Judgment for Plaintiffs should be reversed and this matter remanded for entry of Judgment in Mark's favor.

Respectfully submitted.



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I hereby certify that a copy of the foregoing Reply Brief was served by first class mail on August 29, 2016 on the following counsel of record:

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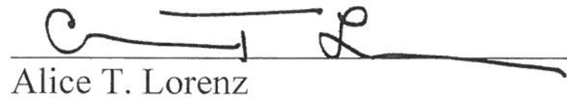

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